MOTION FILED
JAN 11 2000

No. 99 -1000

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

(1) HAROLD M. ARMSTRONG,
Also known as "BO"
and
(2) CARL E. BROWN,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF OF AMICI CURIAE OF ARROWHEAD COUNTIES ASSOCIATION AND KOOCHICHING COUNTY

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ARROWHEAD COUNTIES ASSOCIATION'S MOTION TO FILE AN *AMICUS CURIAE* BRIEF

The Arrowhead Counties Association ("ACA") hereby respectfully moves this honorable Court for an Order permitting the ACA to join in the filing of an *amicus curiae* brief in the above-captioned matter. The respondent, United States, refuses to consent to the participation of the ACA and of Koochiching County.

By resolution, Koochiching County has designated Brian N. Toder to act as its authorized law officer and attorney for purposes of representing Koochiching County in conjunction with the filing of an *amicus curiae* brief on its behalf. Rule 37.4 of Rules of the Supreme Court of the United States provides that no motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of a county when submitted by its authorized law officer. Accordingly, Koochiching County should be permitted to file its brief.

As the ACA merely joins Koochiching County, and as the two entities have a complete community of interests, ACA's motion for leave to join in the filing of this brief should be granted.

Apart from procedural considerations, ACA should be allowed to proceed because its interest is, as is Koochiching County's, sincere. The United States had withheld its consent because it believes that the counties' interests are championed by the State of Minnesota. If the State of Minnesota files an *amicus curiae* brief, such brief would reveal a disparity of interests. The State of Minnesota has narrowly focused its argument on issues affecting its sovereignty, specifically a contest between it and the United States respecting regulation of the waters surrounding Voyageurs National Park. ACA and Koochiching Counties (hereinafter collectively "Counties") focus their arguments on freedom of navigation

and local commerce that have nothing to do with Minnesota's sovereignty or ownership of waters surrounding Voyageurs National Park.

Specifically, the counties take the position that Rainy Lake is among the navigable waters of the United States, subject to admiralty law and regulation by the United States Coast Guard which has exclusive jurisdiction and ability to promulgate rules respecting navigation and commerce, subject to certain enabling legislation and the Administrative Procedures Act. To the extent the National Park Service imposes 36 C.F.R. § 5.3 upon maritime commerce along the border waters, it contraindicates the mission of the Coast Guard which alone has the ability to promulgate rules after notice and hearing.

The foregoing argument is a highly relevant matter not already brought to the attention of the Court. Because the briefing of these issues would be of considerable help to the Court, and because Koochiching County is permitted to file its brief by operation of rule, the ACA respectfully asks this Court to issue an Order allowing the ACA to join in the filing of the attached *amicus curiae* brief in this case.

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TABLE OF CONTENTS

Page

ARROWHEAD COUNTIES ASSOCIATION'S MOTION TO FILE AN *AMICUS CURIAE* BRIEF i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF KOOCHICHING COUNTY AND THE ARROWHEAD COUNTIES ASSOCIATION 1

REASONS FOR GRANTING THE WRIT 2

I. THE RIGHT OF FREE NAVIGATION AND MARITIME COMMERCE UPON RAINY LAKE IS SUBJECT TO EXCLUSIVE REGULATION BY THE COAST GUARD; 36 C.F.R.§ 5.3 WAS IMPROPERLY IMPOSED 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: **Page**

Baldassno v. Larsen, 580 F.Supp. 415 (D. Minn. 1984) 4

Duluth Superior Excursions, Inc. v. Makela, 623 F.2d 1251 (8th Cir. 1980) 4

Shively v. Bowlby, 152 U.S. 1, 32-33 (1894) 3

Spiegel v. Babbit, 855 F.Supp. 402 (D. C. 1994) 7

The Daniel Ball, 77 U.S. 557; 19 L.Ed. 999; 10 Wall. 557 (1870) 4

U.S. v. Carter, 339 F.Supp. 1394 (D. Ariz. 1972) 8

U.S. v. Gerlach Live Stock Co., 339 U.S. 724; 70 S.Ct. 955; L.Ed. 1231 (1950) 3

United States v. Brown, 552 F.2d 817 (8th Cir. 1977) 2

STATUTES:

Act of May 18, 1796, Ch. 29, § 9, 1 Stat. 464 (1796) 3

Northwest Ordinance of 1787, Ch. 8, 1 Stat. 50 (1789) 1, 3

5 U.S.C. § 553 6

16 U.S.C. § 1 7

16 U.S.C. § 160 7

33 U.S.C. § 1221 5

33 U.S.C. § 1231 6

33 U.S.C. § 1231(a) 6

33 U.S.C. § 1231(b) 6

46 U.S.C. § 2103 5

46 U.S.C. § 2104(a) 5

REGULATIONS:

36 C.F.R. § 1.5(c) 7

36 C.F.R. § 3.14(d) 8

36 C.F.R. § 5.3 6-9

RULES:

Rule 37.4 of Rules of the Supreme Court of the United States i

STATEMENT OF INTEREST OF KOOCHICHING COUNTY AND THE ARROWHEAD COUNTIES ASSOCIATION

The Arrowhead Counties Association ("ACA") is an association composed of delegates from the Minnesota Counties of Aitkin, Carlton, Cook, Itasca, Lake, Pine and St. Louis. On September 15, 1999, ACA unanimously adopted Resolution No. 99-01.

Resolution No. 99-01 cites the Northwest Ordinance of 1787 providing that "navigable waters leading into the Mississippi, St. Lawrence and carrying places between the same, shall be common highways and forever free . . ." That same resolution states that "the United States 8th Circuit Court on July 28, 1999 ruled in the Brown and Armstrong vs. United States of America case that the Minnesota Legislature in 1971 unknowingly gave the peoples' inalienable rights to navigate and recreate all waters within the boundaries of Voyageurs National Park to the United States Government...." The Resolution "in the interest of protecting the rights of its citizens' livelihood, and to navigate . . ." commits the ACA to join in the filing of this brief and provide for legal expenses. The Resolution specifically authorizes the engagement of Brian N. Toder, Ltd.

Previously, the Koochiching County Board of Commissioners adopted a similar resolution engaging Brian N. Toder, Ltd.[1]

The ACA and Koochiching County (hereinafter collectively "Counties") have a community of interests. All of Rainy Lake, the situs of the subject matter of these proceedings, is in Koochiching County and St. Louis County.

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[1] Brian N. Toder has authored this brief in whole, and no other person or entity other than Koochiching County and the ACA have or will make a monetary contribution to the preparation or submission of this brief.

The other counties signatory to the ACA resolution border upon waterways connected to Rainy Lake, sharing in the concern that free navigation and commerce has been improperly constrained by the decision below.

It is important to the economic and cultural vitality of the Counties that navigation upon Rainy Lake be unimpaired, subject only to reasonable regulation by the United States Coast Guard. The Counties' interests will not be advanced in the context of the state-versus-federal issue that permeated both courts below. Instead, irrespective of any notions of state sovereignty, the Counties recognize that navigation upon Rainy Lake is properly regulated by the Coast Guard, not by the National Park Service.

Although the Counties vigorously argue that the National Park Service has improperly preempted notions of free navigation and the regulatory authority of the Coast Guard, such argument takes nothing away from the Counties' resolute support of the principle that the State of Minnesota has not ceded jurisdiction of the waters surrounding Voyageurs National Park. The Counties incorporate herein by reference petitioners' arguments in accord with that principle.

REASONS FOR GRANTING THE WRIT

This case exposes the error of the United States Court of Appeals for the Eighth Circuit which decided that its previous holding in United States v. Brown, 552 F.2d 817, 819 (8th Cir. 1977) (State of Minnesota ceded jurisdiction of the waters within the boundaries of Voyageurs National Park to the United States) resolved the matter at bar. It does not. Assuming *arguendo* that the state of Minnesota did so cede, the issue left dangling is, how does the United States control activities on such waters?

The Counties respectfully urge this Court to review this case to prevent the National Park Service from unlawfully

constraining maritime commerce upon Rainy Lake. The Court of Appeals for the Eighth Circuit has empowered the National Park Service to decide matters properly subject to regulation by the United States Coast Guard in the context of Title 33 and Title 46 and in derogation of certain enabling legislation, the general maritime law and the Administrative Procedures Act.

I. THE RIGHT OF FREE NAVIGATION AND MARITIME COMMERCE UPON RAINY LAKE IS SUBJECT TO EXCLUSIVE REGULATION BY THE COAST GUARD; 36 C.F.R. § 5.3 WAS IMPROPERLY IMPOSED

We begin with the notion that the freedom to navigate is a fundamental right that has been part and parcel of our society from time immemorial. As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes* -- things common to all and property of none. U.S. v. Gerlach Live Stock Co., 339 U.S. 724, 744, 70 S.Ct. 955, 965, 94 L.Ed. 1231 (1950). That concept of freedom to navigate evolved through the years and became the subject of the Northwest Ordinance of 1787 where Congress required that "the navigable waters leading into the Mississippi and St. Lawrence, and carrying places between the same, shall be common highways, and forever free . . . ." Ch. 8, 1 Stat. 50 (1789). In the first federal public land statute, enacted in 1796, it was provided that "all navigable waters within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways . . . ." Act of May 18, 1796, Ch. 29, § 9, 1 Stat. 464, 468, cited in Shively v. Bowlby, 152 U.S. 1, 32-33 (1894).

For hundreds of years Rainy Lake has been a public highway. The first commercial vessels were the canoes of the voyageurs, soon followed by steam vessels carrying

passengers and towing log booms. In more modern times Rainy Lake maritime commerce has evolved to include other kinds of commercial vessels, including the tank vessel operated by petitioner Brown.

So too evolved the commerce clause. The seminal case was The Daniel Ball where this Court held that:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. . . . And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 U.S. 557, 563, 19 L.Ed. 999, 1001, 10 Wall. 557 (1870).

Rainy Lake certainly is among the navigable waters of the United States. See e.g., Baldassno v. Larsen, 580 F.Supp. 415 (D. Minn. 1984). Petitioners' conduct, carrying passengers for hire, is a traditional maritime activity. Duluth Superior Excursions, Inc. v. Makela, 623 F.2d 1251, 1253 (8th Cir. 1980). Accordingly, petitioners are subject to federal regulation. The issue is, however, whose regulations.

Petitioner Carl E. Brown ("Brown") is licensed by the United States Coast Guard as "Master of Steam or Motor Vessels of Not More Than 50 Gross Tons Upon the International Boundary Waters of Northern Minnesota, Their Connecting and Tributary Waters Between Lake of the Woods and Lac LaCroix." The license was issued in 1997 and expires in 2002. The license permits him to carry cargo or

passengers for hire upon the waters enumerated, including all of Rainy Lake and waters within the boundaries of Voyageurs National Park. Similarly, Brown's vessels are properly documented.

Brown's business and maritime commerce and safety is regulated in large measure by the United States Coast Guard acting pursuant to Title 46 and Title 33.

46 U.S.C. § 2103 bestows upon the Secretary of Transportation the duty to administer Title 46 and to prescribe regulations. 46 U.S.C. § 2104(a) provides, "The Secretary may delegate the duties and powers conferred by this subtitle to any officer, employee or member of the Coast Guard, and may provide for the subdelegation of those duties."

Similarly, Title 33 empowers the Coast Guard to regulate marine traffic and promulgate reasonable regulations consistent with the statement of policies enumerated in 33 U.S.C.§ 1221:

> The Congress finds and declares--
>
> (a) that navigation and vessel safety and protection of the marine environment are matters of major national importance;
>
> (b) that increased vessel traffic in the Nation's ports and waterways creates substantial hazard to life, property, and the marine environment;
>
> (c) that increased supervision of vessel and port operations is necessary in order to--
>
> (1) reduce the possibility of vessel or cargo loss, or damage to life, property, or the marine environment;
>
> (2) prevent damage to structures in, on, or immediately adjacent to the navigable waters of the United States or the resources within such waters;
>
> (3) insure that vessels operating in the navigable waters of the United States shall comply with all applicable standards

and requirements for vessel construction, equipment, manning, and operational procedures; . . . .

Most importantly, 33 U.S.C. § 1231 requires the Secretary [of Transportation acting through the Coast Guard] to issue or amend regulations "[i]n accordance with the provisions of section 553 of Title 5 . . . [the Administrative Procedures Act]." 33 U.S.C. § 1231(a). The Coast Guard is required to receive and consider the views of all interested parties, including--

(1) interested Federal departments and agencies,

(2) officials of State and local governments,

(3) representatives of the maritime community,

(4) representatives of port and harbor authorities or associations,

(5) representatives of environmental groups,

(6) any other interested parties who are knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment, and

(7) advisory committees consisting of all interested segments of the public when the establishment of such committees is considered necessary because the issues involved are highly complex or controversial.

33 U.S.C. § 1231(b).

If the Coast Guard decided to promulgate a rule that effectively banned passenger vessels from transiting one end of Rainy Lake to the other, which is precisely the effect of 36 C.F.R. § 5.3, not only would the Coast Guard have to comply with 33 U.S.C. § 1231(b), but it would also have to comply with the Administrative Procedures Act requiring notice, an opportunity for comment and the right to petition for repeal of the rule. 5 U.S.C. § 553.

The Coast Guard did not, however, suggest such a rule. Such a rule took the form of 36 C.F.R. § 5.3 and was imposed upon the waters surrounding Voyageurs National Park by the National Park Service ("NPS"). This imposition was devoid of any accompanying right to notice and comment. This imposition was in violation of the NPS's 36 C.F.R.§ 1.5(c) requiring a written determination justifying any non-emergency park restriction. Spiegel v. Babbit, 855 F.Supp. 402, 403 (D. C. 1994).

Most importantly, the imposition was devoid of common sense, as 36 C.F.R.§ 5.3 not only unduly burdens interstate commerce, it contraindicates its own enabling legislation, 16 U.S.C. § 1. Prohibiting commercial passenger vessels from innocent passage does nothing to "conserve the scenery and natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* Indeed, the regulation in these waters serves to encourage increased vessel traffic, as persons must rely upon private vessels with the concomitant, exponentially greater pollution and presence. More specifically, Congress has declared that

> The purpose of this is to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States.

16 U.S.C. § 160. The imposition of 36 C.F.R. § 5.3 serves to close the waterway for present and future generations.

The court below concluded, "Certainly, requiring a tour boat operator in a national park to obtain a permit is not

unreasonable and is not inconsistent with the privilege of free navigation." Op. at 14. The two key facts that escaped the court's attention is that 33 C.F.R. § 5.3 applies to any commercial passenger vessel transiting the waters surrounding the park, and no permits are available. Thus the case presents a paradigm example of a regulation, as imposed here, inherently unreasonable, inconsistent with the privilege of free navigation and in derogation of Congressional direction.

In U.S. v. Carter, 339 F.Supp. 1394 (D. Ariz. 1972) the court considered plaintiff's contention that the 36 C.F.R. § 5.3 did not preclude his operations in the Glen Canyon National Recreation Area. While the facts presented there render that court's holding inapposite, the court's comments on the scope of the NPS's jurisdiction are useful in the instant matter. "Carter's argument that the Secretary does not have jurisdiction over carriers that sail on navigable waters in the park area would be stronger if he did not carry his boats over federally-owned land . . ." Carter, 339 F.Supp. at 1397. In the matter at bar, petitioner Brown did not touch upon park land, nor did his voyage contemplate doing so. Interestingly, the court in Carter referred to 36 C.F.R. § 3.14(d) which reads:

> No privately owned vessel shall be used to carry passengers for hire, or be used in any other commercial operation, unless written authorization has been granted in accordance with § 5.3 of this chapter, except as provided by special regulations for areas having navigable waters.

36 C.F.R. § 3.14(d) (emphasis added).

Petitioner Brown regularly and lawfully operated his tank vessel through the waters surrounding Voyageurs National Park. No one questioned the propriety of this form of

commerce. When his cargo became passengers, he was charged criminally by application of 36 C.F.R. § 5.3 although he plied the same waters. Petitioner Armstrong is a Canadian citizen in charge of a Canadian vessel, sailing from one Canadian port to another. When he entered waters surrounding Voyageurs National Park he was charged criminally by application of 36 C.F.R. § 5.3. Petitioners' were following a designated route marked by Coast Guard navigational aids. By declaring that commercial vessels carrying passengers cannot follow a route established for such vessels by the Coast Guard, the NPS has improperly overstepped its bounds.

CONCLUSION

For the foregoing reasons, this Court is respectfully urged to grant a Writ of Certiorari.

Dated: January 6, 2000.

Respectfully submitted,

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